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No. 549.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI et al.,

Petitioners,

vs.

BRASHEAR FREIGHT LINES, INC., et al.,

Respondents.

PETITION OF RESPONDENTS FOR A REHEARING.

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PETITION OF RESPONDENTS FOR A REHEARING.

Come now the above-named respondents and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully show:

The opinion of the Court set forth four questions to receive consideration, as follows:

1. Should the two additional judges, called to assist the District Judge pursuant to section 266, have participated in consideration of the motion to assess damages?

2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication of the issues presented by petitioners' motion to assess damages?

3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the Court's action for assessment of damages?

4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?

We shall refer to these in order.

1. Respondents have no complaint to urge concerning the action of the Court or the discussion of the opinion on this point.

2. The opinion holds that the judgment dismissing the motion for assessment of damages cannot be supported upon the ground that the issues raised by it had been adjudicated by the prior dismissal of the counterclaim. As grounds for this ruling the Court asserts, "Some of the damages asserted in the motion—such as the costs of the litigation—were not asserted in the counterclaim."

There is no type of relief sought in the motion for damages which is not sought in the counterclaim. The Court has evidently overlooked the fact that prior to filing the motion for damages petitioners filed a "Motion of Defendants for Costs" (R. 73). This was filed September 15, 1938, whereas the motion for damages (R. 79) was not filed until May 22, 1939.

The situation, then, is this: It is asserted that the motion for damages includes subject matter beyond the purview of the counterclaim. A perusal of the motion for damages (R. 79 et seq.) shows that it seeks only to assess license fees and costs. It does not by its terms purport to seek

expenses of litigation, etc. If, by costs, it is meant as petitioners urge, expenses of litigation, it can be answered then (1) the motion for damages did not seek them; (2) that field was preempted by petitioners' motion for costs (R. 73).

If, on the other hand, by "costs" is meant the ordinary and usual costs of litigation, the motion presents nothing new, because such costs follow as a usual incident to the decision of the case (Simpkins, Federal Practice 1938, sec. 818 et seq.).

Accordingly, it seems that the District Court was correct in assuming that no type of relief was sought by the motion for damages not contained in and hence ruled upon in the ruling on the counterclaim.

It follows that the District Court was correct in dismissing the former as having already been ruled in the case of the latter.

Respondents believe that if the Court considers the motion of defendants for costs and its effect upon the question for consideration it should revise its opinion with reference to the second question. Respondents respectfully so urge.

3. The opinion holds that respondents were proper parties to invoke the Court's action for the assessment of damages. This appears to be based in part upon the assumption that the Missouri Attorney-General is given exclusive authority to bring suit in the name and on behalf of the State. That is true. But the opinion overlooks the fact that he is given this authority to do so as **counsel**, not as **party litigant**. It is submitted, a court cannot with propriety render a judgment in favor of a client himself not a party merely because one authorized to serve as the client's attorney is a party litigant. It would appear that this issue and the effect of this statute could well be left for the trial court to consider.

It is said that respondents are in a poor position to argue that petitioners are not proper parties for this purpose, for one of the grounds upon which the injunction was sought was that these particular petitioners were threatening to bring actions against respondents to collect these fees. The petition for injunction did not seek to enjoin the State Treasurer, nor did it seek to enjoin the collection of license fees. What it sought to enjoin (R. 17) was actions to collect penalties, and the institution of criminal actions under the Missouri Bus and Truck Act.

It is also stated in the opinion that respondents executed bonds running to the enjoined officials in which they agreed to pay the damages suffered. Obligation of a bond to the defendant in an injunction suit should not be stretched by implication to cover an entirely different type of damage to another person, the State Treasurer, not a party to the litigation.

If it be said that the stipulation (R. 20) had the effect of broadening the restraining order, we have this situation. The Court would then be deciding an issue of law and fact without presentation or consideration of evidence. Respondents urge and feel that they can prove, if given opportunity before the trial judge, that the stipulation does not and was never intended to include border city fees (R. 76). If respondents are correct in this, there was no damage suffered by petitioners or the State Treasurer or the State.

It is only by assuming the stipulation covered border city operations, i. e., that respondents are in error, can it be said that damage was suffered, as all other fees were paid. Respondents should have an opportunity to present the evidence and show the circumstances to the trial court. Respondents feel that the purport of the opinion, in effect, constitutes a decision of the issue on mere argument in this court.

This fundamental issue should, we earnestly urge, be left for consideration with proper proof of fact and circumstances, for the trial court. The proof, we may add, will be voluminous, consisting of letters, documents, conversations, and other evidentiary matter.

4. It is here held that the District Court (or the Three-Judge Court) erroneously exercised its discretionary power by refusing to hear the merits of petitioners' motion to assess damages. The Court so ruled because it is said that petitioners might have to bring separate actions against each of the seventy-six respondents, and might have to sue some of them elsewhere than in the State of Missouri.

It is said there is a controversy on the point. The mere fact that petitioners controvert the true situation should not justify reversal of the Circuit Court of Appeals' opinion. As a matter of law we say in the circumstances here,

> "the State or State Treasurer, pursuant to the Rules of Practice in District Courts of the United States, No. 20, may proceed against all nonresident respondents in one court and in one proceeding. Furthermore, they are all amenable to service by the simple expedient of serving process upon the secretary of the Public Service Commission.
>
> R. S. Mo. 1929 (as amended), Sec. 5279.
>
> "In view of the foregoing, it will be seen that the State is not relegated or sent anywhere. If it chooses voluntarily to pursue these parties further, it can do so in the local courts, as to citizens of this State (exactly as it must proceed against carriers not party to the litigation—exactly as it would have been required to proceed but for the litigation). As to nonresidents, it can proceed against them in one action in a federal court within this very State and forum" (Respondents' Brief, p. 33).

The mere assertion by petitioners that they might have to file numerous suits in numerous forums does not justify the conclusion that the Three-Judge Court abused its discretion in the circumstances.

In this connection the Court says that "part of the damages for which recovery is sought is made up of various items of cost and expense incurred in the litigation." This statement confirms respondents' feeling that the Court has a misconception about what is involved in the motion for damages. It included no item of expense whatsoever. That subject matter was exhausted by the motion for costs, which sought expenses such as witness fees, attorneys' fees, travel expenses, expenses of transcript of evidence, expenses of printing brief, etc., all as disclosed in the record, pages 73, 74 and 75. Surely, in view of the subject matter of the motion for costs it cannot be correct that the motion for damages includes a request for that type of relief or was ever intended to.

Conclusion: The Court in the opinion concludes with these two sentences: "The circumstances of this case call so strongly for an assessment by equity that we think the Court erred in dismissing the motion for assessment of damages. And it is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself." The first sentence may mean that circumstances call strongly for consideration by a court of equity of the subject of assessment of damages, if any. If it means more than that it appears to limit the District Judge when the matter reaches him in consideration of the damages to a mere consideration of how much they should be. If that is the intent of the sentence, it deprives respondents of their right to make various defenses, and therefore improperly decides the issue without evidence, but merely on argument.

The second sentence implies a loss to the state which really and in fact did not exist. The State was not attempting to collect such border city license fees from other carriers similarly circumstanced. It had not done so for years. It was the understanding of respondents that the State was not attempting to do so in this case, and that the stipulation (R. 20) had to do only with the type of license fees that were actually paid by respondents. Respondents' supplementary statement (R. 75) sets forth respondents' understanding, that the parties were not to interpret the stipulation as including or dealing with border city operations. It would appear that the Court should afford the respondents opportunity to present argument and evidence on the validity of their understanding. The matter was considered in voluminous correspondence between the parties. It was the subject of several conferences, yet this Court apparently has assumed without the benefit of any evidence on the subject matter that respondents' understandings are incorrect. If the matter can be considered by the District Court and if the District Court finds that the parties did not intend that respondents be obligated for border city fees, regardless of all else, there is no liability for these license fees, and no liability under the motion for damages. This Court, it is respectfully submitted, should not circumscribe the investigation by the District Judge into that subject matter. If, upon a hearing, the District Judge feels that there was to be no commitment or liability to pay border city operation fees, then this is not a case which calls "so strongly for an assessment by equity," and it is not a case where it is "especially fitting that equity exert its full strength" to protect the State from loss, because the State suffered no loss.

The State of Missouri was not seeking to collect border city fees from respondents or from anybody else. Re-

spondents should not be foreclosed from presenting their views on this subject and the facts concerning it to the District Court.

The underlying assumption, as we read the opinion of the Court, is that respondents have been improperly withholding money owed to somebody, and that petitioners can invoke the aid of the Court to take that money from respondents and give it to the proper party. Respondents should be given an opportunity to show they owe no money to anybody in this connection. If they are thus able to show that fact, the underlying assumption of this Court will be seen to be without foundation.

The judgment of the Circuit Court of Appeals should upon further consideration be affirmed. In the alternative the opinion should be modified as to subdivisions second, third and fourth.

Respectfully submitted,

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B. W. LaTOURETTE,
PAUL G. KOONTZ,
Counsel for Respondents.

Certificate of Counsel.

We, the undersigned counsel for the above-named respondents, do each hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

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PAUL G. KOONTZ,
Counsel for Respondents.

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SUPREME COURT OF THE UNITED STATES.

No. 549.—October Term, 1940.

Public Service Commission of the State of Missouri, et al., Petitioners, *vs.* Brashear Freight Lines, Inc., et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 31, 1941.]

Mr. Justice Black delivered the opinion of the Court.

The issues in this case revolve around the power of a federal District Court to assess damages allegedly caused by a temporary injunction issued by the court but later dissolved on final hearing. These issues grow out of this situation: Respondents in this Court, seventy-six individuals, partnerships, and corporations operating trucks as common carriers in interstate commerce, filed a bill in the federal District Court to enjoin petitioners here, Missouri officials and agencies, from enforcing against them certain allegedly unconstitutional tax and license features of the Missouri Bus and Truck Law.[1] A single district judge granted a temporary restraining order under which respondents were required to post injunction bonds and under which the contested fees were to be deposited with a trustee during the litigation. But because the bill sought to restrain state officials from enforcing an allegedly unconstitutional state statute, the case was set down for hearing before a three judge District Court pursuant to section 266 of the Judicial Code as amended, 28 U. S. C. § 380. Petitioners, in their answer to respondents' complaint, counterclaimed for fees and licenses the respondents had failed to pay in the past[2] and later amended the

[1] Mo. Rev. Stats. (1929) § 5272, as amended by Mo. Laws (1931) p. 311. The Missouri officials were the Attorney General, the Superintendent of the State Highway Patrol, the State Highway Commission, and the Public Service Commission. The ground of attack on the statute was that it violated the federal Constitution and the federal Motor Carrier Act of 1935, 49 Stat. 543, 49 U. S. C. §§ 301-327 (Supp. 1939).

[2] Respondents denied "each and every allegation, statement and thing" contained in the counterclaim. Later they contended that it was the understanding of the parties that should the counterclaim become material, then this pleading could be withdrawn and "an opportunity to plead fully" to the counterclaim be exercised. Petitioners denied that there was any such understanding.

counterclaim to include amounts the respondents failed to deposit with the trustee during the litigation. Ultimately, the three judge court found the Bus and Truck Law constitutional, dissolved the restraining order, dismissed the truck operators' bill, and also ordered the counterclaim dismissed without prejudice because of "serious doubt as to the right of the defendants to maintain" such an action. The truck operators did not appeal from the dismissal of their bill. Petitioners' attempt to bring the dismissal of their counterclaim here by direct appeal was dismissed for want of jurisdiction. 306 U. S. 204. Thereupon the petitioners, on their own behalf and "in behalf of the State of Missouri and of the State Treasurer", filed in the three judge court a motion for assessment of damages and costs against the truck operators and their injunction bond sureties. That court denied the requested relief on the ground that the questions presented by the motion for damages had been ruled upon and finally determined by the judgment dismissing the original counterclaim. The Circuit Court of Appeals affirmed,[3] but on a different ground. It held that the motion to assess damages involved issues ancillary to the original litigation, which would require a long and complicated inquiry; that such litigation is not the type for which a three judge court is provided; that the three judge court, however, did have jurisdiction to consider the motion if it saw fit, or to remit it to the single district judge; and that the action actually taken by the three judge court was final, since under the circumstances that court had not abused its discretion. We granted certiorari, 311 U. S. —, primarily because of the procedural importance of determining the statutory function of a three judge court in dealing with questions such as those here presented. The case as presented to us requires that we give consideration to these questions:

1. Should the two additional judges, called to assist the district judge pursuant to section 266, have participated in consideration of the motion to assess damages?

2. Was the District Court correct in holding that its prior denial of the counterclaim was a final adjudication of the issues presented by petitioners' motion to assess damages?

[3] 114 F. (2d) 1.

3. Were the enjoined Missouri officials and agencies, to whom the injunction bonds ran, proper parties to invoke the court's action for assessment of damages?

4. Did the District Court erroneously exercise its discretionary power, by its refusal to hear and determine the merits of petitioners' motion to assess damages?

First. We are of opinion that the two judges called in under section 266 to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed. For section 266 of the Judicial Code provides for a hearing by three judges, instead of one district judge, only in connection with adjudication of a very narrow type of controversy—applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the federal Constitution.[4] The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of section 266 had no application.[5]

But the fact that it was mistakenly assumed that the motion should be passed upon by the district judge in association with the two judges previously called did not of itself invalidate the District Court's judgment dismissing the motion. Though that judgment of dismissal was not appealable directly to this court under section 266, even though participated in by three judges,[6] it was

[4] See Phillips *v.* United States, No. 201 this Term; Oklahoma Gas & Electric Co. *v.* Oklahoma Packing Co., 292 U. S. 386; Ex parte Public National Bank, 278 U. S. 101, 104.

[5] A District Court composed of three judges under section 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties. Railroad Commission of California *v.* Pacific Gas & Electric Co., 302 U. S. 388, 391; Sterling *v.* Constantin, 287 U. S. 378, 393-394.

[6] See, e. g., Public Service Commission *v.* Columbia Terminals Co., 309 U. S. 620; Public Service Commission *v.* Brashear Freight Lines, 306 U. S. 204, 207. Cf. Eichholz *v.* Public Service Commission, 306 U. S. 268.

reviewable by the Circuit Court of Appeals, and since it has been so reviewed, the issues presented are properly before us.

Second. The ground assigned by the District Court for denying the motion to assess damages was that by its previous dismissal of petitioners' counterclaim it had already ruled upon and finally determined the questions raised by the motion. The original counterclaim, however, was dismissed without a hearing on the merits. No evidence was heard. It was dismissed, as the court said at the time, because of "serious doubt as to the right of the defendants to maintain such counterclaim", and in the order of dismissal it was specified that the action taken was "without prejudice to the right of the defendants . . . . to maintain an independent action or suit thereon." We need not here point out the procedural reasons which might have caused the "serious doubt" which prompted the court to dismiss the counterclaim. For even assuming that the court properly dismissed the counterclaim without a hearing on the merits, it does not follow that its dismissal was a final adjudication of either the procedural or the substantive right of petitioners to invoke the court's jurisdiction by a motion to assess damages. Some of the damages asserted in the motion—such as the costs of the litigation—were not asserted in the counterclaim, and such damages could not well have been determined until after final adjudication of the issues which caused the three judge court to be invoked. The record shows that action on the counterclaim was deferred pending full hearing on the constitutionality of the Missouri statute under attack. This postponement might well be attributed to a belief on the part of the court that the questions raised by the counterclaim were matters which could be better determined after final determination of the issues presented by the original bill for injunction. The judgment dismissing the motion for assessment of damages cannot be supported upon the ground that the issues raised by it had been adjudicated in the prior dismissal of the counterclaim.

Third. Respondents also seek to support the court's judgment upon the ground that the enjoined state officials and agencies are not the proper parties to invoke the court's action for assessment of damages brought about by the injunction. This claim cannot be sustained. The argument on which it rests is that the State Treasurer, not the Public Service Commission, is given statutory power

to collect the fees that are in part the basis of the motion to assess damages. But petitioners insist that the Public Service Commission actually collects the fees under customs and rules of long standing, and urges that statutory authority exists for such action by the Commission. But whoever has the statutory authority to collect fees, it is not denied that the Missouri Attorney General, one of the enjoined and petitioning officials, is given exclusive authority to bring suit in the name of and on behalf of the state.[7] And if upon a hearing damages are shown to have been suffered within the terms and conditions of the injunction bonds, the district court sitting in equity has ample power to see that whatever sums are recovered go to the proper state officials. In addition to this, respondents are in a poor position to argue that petitioners are not proper parties, for one of the grounds upon which the respondents claimed an injunction against these particular petitioners was that it was they who were threatening to bring actions against respondents to collect the very fees which are now a part of the present motion for assessment of damages. At the instance of the operators, these state officials were for a period of fifteen months deprived of all opportunity to collect any fees except those deposited with the trustees pursuant to the terms of the restraining order. Petitioners' motion alleges that many operators failed to comply with the conditions imposed by the order, and that the state has been deprived of fees that it would have collected but for the injunction. The respondents did not bring their suit nor press their claim upon the assumption that these officials could not and would not protect the interest of the state. On the contrary, they acted upon a directly opposite premise and executed bonds running to the enjoined officials in which they agreed to pay the damages suffered. It is obvious, and was obvious from the beginning, that the main damages would be suffered by the State of Missouri and not by these petitioners as individuals. It was to protect the state through its officials that the bonds were required. In making this requirement the court acted in harmony with the governing principle "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United*

[7] Mo. Rev. Stats. (1929) § 11276. (Mo. Rev. Stats. (1939) § 12901.)

States, 306 U. S. 153, 157. Petitioners were proper parties to invoke the court's protection of the state's interest, and we have no doubt but that the court can mould any decree it renders so as to safeguard the rights of all interested parties.

Fourth. There yet remains the basis upon which the court below affirmed the District Court's refusal to assess damages—that the jurisdiction to exercise this power is discretionary, and that refusal to exercise the power was not shown to be erroneous. In considering this question, it is of no importance that dealing with petitioners' motion for assessment of damages would involve long and complicated hearings on issues inappropriate for decision by a three judge court. For as we have pointed out, the issues were appropriate for decision by the single judge of the district. There can be no question of that judge's right to deal with issues such as those here presented. Under long settled equity practice, courts of chancery have discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint ultimately determined to have been improperly granted. *Russell* v. *Farley,* 105 U. S. 433, 444 *et seq.; Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 279. This power is, as stated, discretionary; there are of course cases where the Chancellor might properly conclude that parties should be remitted to an action at law. But this is not one of those cases. If petitioners had to bring actions at law, each of the seventy-six respondents might have to be made a defendant in a separate action. There is a controversy between the parties as to whether or not all of these respondents could be sued or served in the State of Missouri; to be compelled to sue some of them elsewhere would work a hardship on the state. In addition to this, part of the damages for which petitioners seek recovery is made up of various items of cost and expense incurred in the litigation; if petitioners succeed on the merits, there might conceivably be serious problems raised by the seventy-six respondents as to the portion of damages fairly attributable to each—a problem peculiarly appropriate to equity, and preeminently adapted to settlement by a single court. Here, respondents joined themselves together in order jointly to restrain petitioners; they executed joint bonds; and they invoked the action of equity which has traditionally exerted its power not merely to assess damages caused by improvident injunctions but also to pre-

vent the harmful consequences of an unnecessary multiciplicity of causes of action. The circumstances of this case call so strongly for an assessment by equity that we think the court erred in dismissing the motion for assessment of damages. And it is especially fitting that equity exert its full strength in order to protect from loss a state which has been injured by reason of a suspension of enforcement of state laws imposed by equity itself.[8] The judgment of the court below is reversed and the cause is remanded for proceedings before a single district judge in conformity with this opinion.

Reversed and remanded.

END

[8] Cf. United States *v.* Morgan, 307 U. S. 183, 197; Inland Steel Co. *v.* United States, 306 U. S. 153, 158; Arkadelphia Milling Co. *v.* St. Louis Southwestern Ry., 249 U. S. 134, 145-146.